

accidental injury. The matter was appealed to the Appeals Board, which affirmed the granting of benefits for the July 1998 accident and remanded the matter back to the Administrative Law Judge for findings regarding the February 2, 1998, accident. Claimant alleged the February 2, 1998, accident was a series through his last day worked, April 22, 1998. However, the testimony appears to focus on either February 2, 1998, or February 3, 1998, as a specific traumatic onset date.

The January 12, 1999, Order of the Administrative Law Judge held that claimant had failed to prove timely notice of the February 1998 accident as required by K.S.A. 44-520. The Administrative Law Judge noted that he believed the implications of the September 1998 Order should have been clear. However, the September 1998 Order fails to mention either February 2, 1998, as an accident date or any series of accidents through April 1998.

Claimant contends he advised his supervisors of the accident within the ten days required by K.S.A. 44-520, with specific particularity. Claimant alleges he told the shop foreman, Randy Tevis, on the date of accident. Mr. Tevis denied this, saying that, had claimant advised him of a work-related accident, he would have been referred to a company doctor. Claimant alleges he told Brent Henry, the shop superintendent, on the date of accident. Mr. Henry also testified in this matter and denied being told by claimant of any injury on or about February 2 or 3, 1998.

Claimant testified that this incident occurred while he was bending tubing, but neither of respondent's witnesses corroborate claimant's version of the accident. All witnesses in this matter agree claimant had a bad back and had suffered from back problems for many years. Mr. Henry discussed a particular incident called a "bull-a-rama" where claimant was pulling a tag off of a bull. When claimant came to work the next day, he was favoring his back and complaining of back pain. But Mr. Henry is adamant that claimant, at no time, advised him of any work-related accident while working for respondent.

Cliff Henderson and Max Hamilton both testified on claimant's behalf. Mr. Henderson, a coworker of claimant, remembered talking to Mr. Henry and to Ralph Miller, another foreman for respondent, regarding claimant's layoff in April 1998. He was advised that it was due to a back injury that claimant suffered, which prevented claimant from working. Mr. Henry was not sure when this conversation took place, but believed it was sometime in May 1998.

Mr. Hamilton, a coworker of claimant, remembered claimant having problems at the time they were bending the tubing. Mr. Hamilton described ongoing back complaints as being common among the workers on that job. However, Mr. Hamilton, who also suffered from back complaints, had not filed a workers' compensation claim and had not advised respondent of his ongoing problems. He was unaware whether claimant had ever advised

respondent of his back pain. He did know that claimant had had a back problem for a long period of time.

K.S.A. 44-520 requires that a claimant provide notice to the respondent of an accidental injury within ten days of the date of accident, stating in particular the time and place of the accident.

It is claimant's burden to prove his entitlement to benefits by proving all the elements required under the Workers Compensation Act by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

Here, the Administrative Law Judge had the advantage of observing the testimonies of claimant, Mr. Tevis, Mr. Henry, Mr. Henderson and Mr. Hamilton. In these situations, the Appeals Board has generally deferred to the Administrative Law Judge when considering the credibility of witnesses who testify live before the Administrative Law Judge. In this instance, the Administrative Law Judge found claimant's testimony to be less than persuasive, finding claimant had failed to provide timely notice as required by the statute. The Appeals Board concludes that the Administrative Law Judge's decision should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated January 12, 1999, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

c: Cynthia J. Patton, Topeka, KS
Gary R. Terrill, Overland Park, KS
Michael W. Downing, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director